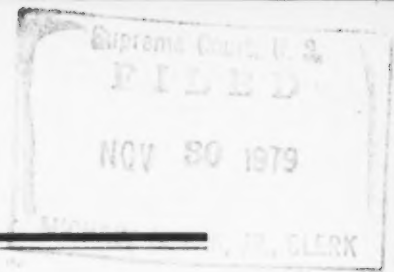


No. 79-603



In the Supreme Court of the United States

OCTOBER TERM, 1979

HOTEL CONQUISTADOR, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

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The question presented by the conditional cross-petition is whether the Court of Claims correctly held that an employer who has allegedly overwithheld and overpaid Federal Insurance Contributions Act (FICA) taxes must repay or otherwise adjust the overcollection of the employees' share of those taxes before it is entitled to claim a refund or credit of the employer's share.

The pertinent facts may be summarized as follows: During 1971, petitioner served free meals to many

of its employees on a daily basis in accordance with labor agreements, and paid FICA and Federal Unemployment Tax Act (FUTA) taxes, upon the value of such meals as "wages." It computed its liability, as well as that of its employees, on the basis of a value of 45 cents per meal. On audit, the Internal Revenue Service assessed additional FICA and FUTA taxes against petitioner on the ground that the meals should have been valued at \$1.25. Petitioner paid the additional taxes (including both the employer's and employees' portion of the additional FICA taxes) and filed a claim for refund of the employer portion of the FICA taxes originally paid on the 45-cent value, and all FICA taxes paid pursuant to the assessment (Pet. App. 3a-4a).¹

Upon the Internal Revenue Service's denial of its claim, petitioner initiated this refund suit in the Court of Claims for all of the FICA and FUTA taxes which it paid on the ground that the meals were not "wages" for purposes of FICA and FUTA. The Court of Claims held that the meals were not taxable "wages" subject to FICA and FUTA taxes (Pet. App. 8a) and the government has filed a petition for a writ of certiorari (No. 79-742) seeking review of that decision. However, the Court of Claims also held that petitioner was not entitled to a refund of the employer FICA taxes paid on the original 45-cent

¹ "Pet. App." refers to the appendix to the government's petition in *United States v. Hotel Conquistador, Inc.*, No. 79-742.

value because it had not made any attempt to reimburse or obtain an adjustment of its employees' share of the alleged overpayment on the 45-cent value (Pet. App. 15a-17a). Petitioner has filed a conditional cross-petition seeking review of this wholly discrete procedural aspect of the decision below in the event the Court grants the government's petition.

1. The Court of Claims correctly held that petitioner was not entitled to a refund of the employer's portion of FICA taxes. In so ruling, the decision below is in accord with *Atlantic Department Stores, Inc. v. United States*, 557 F.2d 957 (2d Cir. 1977), the only other appellate ruling on the question. There, the employer erroneously included sick leave payments in the wages base upon which it calculated both employer and employee FICA tax liability. After discovering the error, it claimed a refund of only the employer's portion of the FICA taxes allegedly overpaid. The court of appeals held that the employer was entitled to a refund or credit for the employer taxes, only if it either reimbursed its employees or claimed a refund or credit for the employees' share of the overpaid taxes on their behalf. The court concluded that Section 6413 of the Internal Revenue Code of 1954 and the pertinent Treasury Regulation on Employment Taxes, required an employer to protect the rights of its employees to recover their share of overpaid FICA taxes as a prerequisite to recovery of its own share of such taxes (557 F.2d at 959). In the court's view, such an interpretation placed a rea-

sonable burden on employers and promoted administrative efficiency (*id.* at 961).²

The decision below correctly held that petitioner was not entitled to a refund of FICA taxes paid on the 45-cent per meal value because it had not repaid or otherwise adjusted its employees' accounts (Pet. App. 16a). Section 6413 of the Code requires that an overpayment of FICA taxes be adjusted or refunded in accordance with Regulations prescribed by the Secretary. The Regulations are legislative in character. They provide that an employer who ascertains³ that FICA taxes have been overpaid must: (1) repay each employee the amount improperly withheld, (2) reimburse his employees by applying the amount of overcollected taxes against future FICA tax liability; or (3) secure the written consent of the employees to seek a credit or refund on their behalf. Treasury Regulations on Employment Taxes, Sections 31.6413(a)-1(b)(1) and 31.6402(a)-2 (26 C.F.R.). If the employer makes such adjustments or refund pursuant to the Regulations, he may file a claim for refund or credit of both the employee and the employer portions of the alleged FICA overpayment. Here, however, petitioner did not make any

² In *Entenmann's Bakery, Inc. v. United States*, 465 F. Supp. 1118 (E.D.N.Y. 1979), the court held that the employer's obligation to reimburse its employees or claim a refund on their behalf extends even to employees no longer in its employ at the time the error was ascertained.

³ An error is "ascertained" when the employer has sufficient knowledge of the error to be able to correct it. Treasury Regulations, Section 31.6413(a)-1(b)(1)(iv).

such adjustment or refund and does not purport to have complied with the Regulations (see Pet. App. 16a).

As the Court of Claims correctly pointed out (Pet. App. 16a), it is reasonable to require that the employer ensure that his employees recover amounts improperly withheld from their salaries. The employer determines what amount shall be withheld for FICA taxes, with little, if any, consultation with or advice from his employees. Consequently, if FICA taxes are improperly withheld, it will probably be the result of the employer's unilateral decision. Moreover, the employer is the one most likely to discover the error, and the one most able to correct it. *Atlantic Department Stores, Inc. v. United States*, *supra*, 557 F.2d at 961. Finally, it is far preferable, from both an administrative and judicial standpoint, to process all claims for alleged overpayment of FICA taxes in a single claim or action, rather than to process the claims of employees on a piecemeal basis.

Petitioner would apparently argue that even if it would be reasonable to require the employer to repay its employees as a prerequisite to his own recovery in cases where a clear error was the cause of the overcollection, such a requirement is inequitable here, where the alleged overpayment is contested by the government (Pet. App. 16a-17a). But that argument ignores the Regulations which allow an employer to satisfy Section 6413 by obtaining the written consent of its employees to seek refunds from the government on their behalf. See Treasury Regulations, Sections

31.6402(a)-2(a)(2) and 31.6413(a)-1(b)(1).⁴ By proceeding in that manner, the employer would be in no danger of incurring out-of-pocket expenses which he might not be able to recover later. Here, however, petitioner has foreclosed the possibility of using such consents because it did not file a claim for refund of the employee taxes with respect to the 45-cent value or file suit with respect to such taxes.⁵

In light of the foregoing, it is plain that the question raised by the conditional cross-petition is entirely unrelated to the question presented in the government's petition whether meals furnished to employees on a daily basis are taxable "wages" for purposes of FICA and FUTA. Moreover, unlike the substantive issue raised by the government's petition, there is no conflict of decisions or demonstrated administrative importance with respect to the question whether petitioners' failure to comply with the procedural requirements preclude their claim for refund of the taxes paid on the 45-cent value.

⁴ Contra: *Palmer House Co. v. United States*, 44 A.F.T.R. 2d (P-H) at ¶ 79-5290, 79-6000 (N.D. Ill. May 11, 1979) (procedural rule that employer first make refunds of FICA taxes to employees as a prerequisite for bringing suit not applicable where government contests alleged overpayment).

⁵ Moreover, petitioner did not comply with the requirement of Treasury Regulations, Section 31.6402(a)-2(c), that a claim for allegedly overpaid taxes identify the employees whose wages were involved.

It is therefore respectfully submitted that the conditional cross-petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979